IN THE

Supreme Court of the United States

October Term, 1976

No. 77-57

CONRAD L. GERMAIN, ROBERT W. KANE, OUTPOST DEVELOPMENT COMPANY, dba LYDIA FELDMAN METHODS, dba BRENDA HARDY RESEARCH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, Conrad L. Germain, Robert W. Kane, Outpost Development Company, dba Lydia Feldman Methods, dba Brenda Hardy Research respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 24, 1977.

Opinion Below.

The opinion of the Court of Appeals, reported at 552 F.2d 868 (9th Cir. 1977), appears as Appendix "A" hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 24, 1977. A due and timely petition for rehearing and suggestion for rehearing *en banc* was filed on or about April 5, 1977. The petition was denied on May 16, 1977. A copy of the Order denying the petition appears as Appendix "B". The United States Court of Appeals for the Ninth Circuit made an order staying issuance of the mandate pending the filing, consideration and disposition by this Court of the Petition for a Writ of Certiorari.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). On June 7, 1977, Mr. Justice Rehnquist extended the time for filing this Petition to July 14, 1977.

Questions Presented.

1. Whether contrary to the decisions of this Court in *Stromberg v. California,* 283 U.S. 359, *Thompson v. Louisville,* 362 U.S. 199, and *In re Winship,* 397 U.S. 358, petitioners were denied due process of law in violation of the Fifth Amendment because the jury was instructed that it was free to base its general verdict on any of the multiple specific acts alleged in the indictment, for some of which there was no evidence to support the verdict, and it is impossible to determine whether the jury convicted on a ground for which there was no evidence.

2. Whether the communications contained in petitioners' advertisement for their diet booklet are protected by the Free Speech and Press provisions of the First Amendment, despite the claim that the advertisement repeats allegedly false representations contained in the booklet.

3. Where the indictment charged fraud by promising and refusing to make refunds and the record discloses that over 28,000 booklets were mailed and only three persons testified that they did not receive their requested refunds, were petitioners denied due process of law and a fair trial guaranteed by the First Amendment by the prosecutor's highly prejudicial and unsubstantiated argument, among others, to the jury that 10,000 people requested and did not receive refunds.

4. Whether the instructions which the court below found to be erroneous, but not plain error, require a reversal in light of the weak evidence against petitioners and cumulative errors of law.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments; and Title 18 United States Code, Section 1341 appear in Appendix "C".

Statement.

1. The indictment herein, in 27 counts, was returned in the United States District Court for the Central District of California on November 5, 1974. The indictment is confusing, each count alleging multiple separate allegedly fraudulent acts. Count One of the indictment is set forth as Appendix "D". The allegations of Count One are realleged in each of the other counts, except for the allegation contained in the last paragraph thereof.

The case arose out of the mailing of an advertisement entitled "WANT TO LOSE WEIGHT?", a copy of which is attached as Appendix "E". Persons who responded to the advertisement by sending the requested

sum of $5.95 received a booklet on how to lose weight, entitled "MY SECRET", a copy of which is set forth as Appendix "F".[1]

Essentially the indictment charged that the advertisement was fraudulent because:

i. It allegedly falsely represented that by following petitioners' diet plan "the fats in the foods you eat are changed into energy instead of fat";

ii. "In many instances" petitioners did not mail the booklet to persons sending $5.95;

iii. "In many instances" petitioners did not, as promised, make refunds to persons requesting the same; and

iv. It allegedly falsely represented that "LYDIA FELDMAN" and "BRENDA HARDY" are real persons.

A. The charge in the indictment that by following petitioners' diet plan, "the fats in the foods you eat are changed into energy instead of fat" was interpreted by the trial court, the parties and the witnesses as meaning that if a person followed the diet plan contained in petitioners' booklet, the person would lose weight.

The Government called two medical experts, both of whom testified that a person following the diet plan would not lose weight but would, in fact gain weight. On cross-examination however one of the government's experts qualified his answer and testified that if a person followed the diet plan strictly, it

[1]Petitioners mailed the brochure and booklet either under the name "LYDIA FELDMAN" or "BRENDA HARDY".

is certainly possible that one could lose weight on this reduction diet. (R.T. 363.)[2]

Petitioners called three expert medical doctors, each of whom testified that the diet plan would work, if strictly followed.

B. In support of the allegation that petitioners were guilty of fraud because they "would and did accept money and orders for [the booklet] 'MY SECRET', which orders in many instances they did not fill", the government called five witnesses who testified that they sent their money but did not receive the booklet.

The undisputed evidence reveals that within the 22-month period covered by the indictment appellants mailed approximately 28,600 booklets.

The government called a former employee of petitioners who testified that she was supplied with computerized process labels that were addressed, and instructed to mail booklets as addressed; that she personally put the booklets in the envelopes and mailed approximately 300 each week. (R.T. 640, 686-689.) A government postal inspector who engaged in test mailings testified that he ordered and received booklets in a reasonable period of time. (R.T. 842-844, 850.)

C. In support of the allegation that petitioners were guilty of fraud because they "would and did in many instances fail to make refunds to those persons who specifically requested them" the government called three witnesses who testified that they requested, and did not receive, refunds. As heretofore noted petitioners mailed approximately 28,600 booklets during the period covered by the indictment.

[2]R.T. refers to Reporter's Transcript.

The government called a former employee of petitioners who testified that she was instructed by petitioners that the booklets were refundable if returned by the customers with the name and address clearly indicated on the envelope or the inside of the book so a refund could be made. (R.T. 632.) She typed out the refund checks and, after checks were signed, mailed them. She personally prepared and mailed approximately 75 refund checks per month.

D. To support the charge in the indictment that petitioners were guilty of fraud because they used the business names "LYDIA FELDMAN" and "BRENDA HARDY" the government called a former employee of petitioners who testified that she never met "LYDIA FELDMAN" or "BRENDA HARDY" and that she did not know anyone who ever met either of them.

The only other evidence on this issue consisted of two certificates of fictitious business names filed with the Los Angeles County Clerk reflecting that petitioner corporation was doing business under the fictitious names of "LYDIA FELDMAN METHODS" and "BRENDA HARDY RESEARCH."

2. At the close of the government's case the government moved to dismiss counts 6, 7, 9, 10, 13, 16, 17 and 23. (R.T. 887.) Petitioners then moved for a judgment of acquittal of the remaining counts because of insufficiency of the evidence. The motion was denied. (R.T. 889-891.) Petitioners again moved for a judgment of acquittal at the close of all the evidence (R.T. 1199), which motion was denied without prejudice to its being raised again when the jury acted or failed to act.

3. The jury was instructed that although the indictment alleged several false and fraudulent representations it was not essential that the government prove each and every one. All that is required, the court told the jury is that the proof show beyond a reasonable doubt any one fraudulent representation. The jury returned a general verdict of guilty on all counts submitted to it.

4. Following the return of the verdict petitioners duly filed a motion in arrest of judgment, a motion for a new trial, and a motion for judgment of acquittal (C.T. 225-228, 230),[3] which motions were denied. The court sentenced each of the individual defendants to 90-year prison terms pursuant to U.S.C. § 4208(b) and fines of $18,000 each. The corporate defendant was also fined $18,000. In all the fines totalled $54,000 and the prison terms totalled 180 years. (R.T. 342.)

5. The court below affirmed, holding that there was sufficient evidence for the jury to find that the representation that a person following the petitioners' diet plan would lose weight was fraudulent. The court expressly declined to decide whether the evidence was sufficient with respect to each and all of the other acts alleged in the indictment. As petitioners show hereinafter there was no evidence to support some of the acts alleged in the indictment, and insufficient evidence to support other such allegations.

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[3]C.T. refers to Clerk's Transcript.

REASONS FOR GRANTING WRIT.

1. The Decision Is Contrary to Decisions of This Court in Stromberg v. California, 283 U.S. 359, Thompson v. Louisville, 362 U.S. 199, and In Re Winship, 397 U.S. 358.

As heretofore noted each count of the indictment charged multiple specific acts as constituting fraud. Thus each count of the indictment alleged that petitioners' advertisement fraudulently represented that persons following the diet plan contained in petitioners' booklet would lose weight; that "in many instances" petitioners did not mail the booklet to persons sending $5.95, as promised; that "in many instances" petitioners did not, as promised, make refunds to persons requesting the same; and that the use of the business names "LYDIA FELDMAN" and "BRENDA HARDY" was fraudulent because they were not real persons.

The jury was instructed that although the indictment alleged several false and fraudulent representations it was not essential that the government prove each and every one. All that is required, the court told the jury, is that the proof show beyond a reasonable doubt any *one* fraudulent representation. The jury returned a general verdict and it is impossible to determine the ground on which the jury based its finding of fraud.

In affirming the jury verdict the court below found solely that there was sufficient evidence for the jury to find that petitioners' representation that a person following their diet plan would lose weight was fraudulent. The court declined to decide whether the evidence with respect to the other acts alleged in the indictment, and submitted to the jury, was sufficient. The court

stated that the testimony that some persons sent their money but did not receive the booklet was merely "*some* evidence of fraud." Similarly the court stated that the testimony that some persons requested, but did not receive a refund was "*some* evidence of fraud." Presumably the court found this evidence insufficient to meet the "beyond a reasonable doubt" test. *In re Winship*, 397 U.S. 358.

The court did not comment on the allegation in the indictment that fraud was committed by using the names "LYDIA FELDMAN" and "BRENDA HARDY", although the jury was instructed that it could convict on this allegation in the indictment. The prosecutor, in his closing argument urged conviction on this ground stating: "There was no Brenda Hardy; there was no Lydia Feldman . . . . I am sure . . . that if Lydia Feldman existed, you would have seen her in the courtroom. . . . There is no Brenda Hardy. You would have seen Brenda Hardy if she existed." (R.T. 1207, 1253.) Petitioners submit that the use of the names "LYDIA FELDMAN" and "BRENDA HARDY" is no evidence of fraud. The court below did not dispute this contention made by petitioners.

If the general verdict rested on the charge that fraud was committed by using fictitious names, petitioners were denied due process of law since the use of such fictitious names constituted no evidence of fraud. *Thompson v. Louisville*, 362 U.S. 199; *Garner v. Louisiana*, 368 U.S. 157, 163; *Shuttlesworth v. Birmingham*, 382 U.S. 87, 94.

If the jury verdict rested on the testimony that some persons sent their money but did not receive the booklet and that others requested, but did not

receive a refund, that evidence failed to meet the "beyond a reasonable doubt" test. *In re Winship*, 397 U.S. 354. See, *Freeman v. Zaharadnick*, ... U.S. ...., 97 S.Ct. 1150 (Stewart, J. dissenting). To say, as the court below did, that the testimony concerning these allegations constituted "some evidence of fraud" is to say that the evidence is insufficient to meet the *Winship* test.

Commencing with *Stromberg v. California*, 283 U.S. 359, this Court has repeatedly held that where a verdict of the jury is general so that it cannot be determined whether it rested on a valid or invalid ground, the conviction cannot be sustained. *Williams v. North Carolina*, 317 U.S. 287, 292; *Cramer v. United States*, 325 U.S. 1, 36, n. 45; *Yates v. United States*, 354 U.S. 298, 312; *New York Times Co. v. Sullivan*, 376 U.S. 254, 284.

Since it is possible that petitioners were convicted on a finding for which there was "no evidence" or insufficient evidence (as defined by *Winship*) a reversal is mandated.

The court below sought to distinguish *Stromberg*, *Williams* and *Yates*, saying:

> "In all three cases . . . the convictions were reversed because they could have been based on an erroneous legal ground. Such convictions are defective. These cases, however, are distinguishable from the instant case, in which appellants claim that the jury could have based its finding of fraud on *facts* for which the evidence was insufficient." (Emphasis in original.)

The *Stromberg* rule however is not so limited. In *Cramer v. United States*, 325 U.S. 1, the accused

was convicted of treason. The indictment set forth a variety of overt acts, three of which were submitted to the jury. In reversing, the Court stated:

> "The verdict in this case was a general one of guilty, without special finding as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted are insufficient." (325 U.S. at 36, n. 45.)

Even on the lower court's own terms a reversal is required here because the jury verdict may have rested on "an erroneous legal ground." As noted above the conviction might have been based on "no evidence." Such a conviction is a denial of due process of law and is "based on an erroneous legal ground." Similarly the jury verdict may have been based on evidence that failed to meet the *Winship* "beyond a reasonable doubt" test. Since *Winship* held that the Due Process Clause requires proof beyond a reasonable doubt of every element of a criminal offense, a conviction that fails to meet that test cannot stand.

In *Yates v. United States*, 354 U.S. at 312, the Court states:

> "[W]e think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."

Applying the "proper rule" as set forth in *Yates*, the verdict herein should be set aside.

2. The Communications Contained in Petitioners' Advertisement for Their Diet Booklet Are Protected by the Free Speech and Press Provisions of the First Amendment, Despite the Claim That the Advertisement Repeats Allegedly False Representations Contained in the Booklet.

The booklet entitled "MY SECRET" contains general information on dieting and represents that by drinking a fruit juice mixture of one-half cup of grape juice, one-half cup of apple juice and one large mashed banana just before regular meals, and eating nothing between meals other than this juice mixture, a person will lose weight. The booklet is concededly protected by the First Amendment.

The advertisement makes essentially the same claim. It states that by following petitioners' diet plan "the fats in the foods you eat are changed into energy—instead of fat." As already noted this statement in the advertisement was interpreted at trial as meaning that a person following petitioners' diet plan would lose weight. Thus, the government argued to the jury "we prove[d] [fraud] by proving that the diet did not work. . . ." (R.T. 1251.)

The court below held that there was sufficient evidence for the jury to find that a person following the diet plan would gain, not lose, weight, saying:

> "[E]ach count alleged that the defendants falsely and fraudulently represented that by using the diet tonic, 'the fats in the foods you eat are changed into energy instead of fat' . . . Two government experts testified that a dieter following the 'with meals' plan would not lose weight but would, in fact, gain weight. The testimony of these experts . . . provided a basis for the jury's verdict."

Finding the evidence sufficient with respect to the above quoted aspects of the case the court stated:

> "We need not decide whether the evidence is also sufficient with respect to each and all of the other acts alleged in the indictment."

It is true that the two government medical experts testified that a person following petitioners' diet plan would not lose weight but would in fact gain weight. But their testimony did not stand uncontradicted. One of the government's experts testified on cross-examination that if a person followed the diet plan strictly he might very well lose weight using petitioners' diet plan. Additionally petitioners called three medical experts who testified in favor of the diet plan.

Dr. Gross testified that if the diet plan was strictly followed according to the rules laid out in the booklet, "it is quite likely that a person would lose weight because of the routine, the ritual, the mixture of the fruit juices will make an important change in the eating behavior of the individual. Whenever a person who wishes to lose weight engages in such activities they tend to eat less." Additionally, it was his opinion that the fruit juice mixture will tend to suppress the appetite and hence a person would eat less. (R.T. 1025.) Dr. Bernstein testified that the diet plan satisfied the psychological and physiological factors essential to any successful weight reduction program. (R.T. 1067.) He himself successfully went on the plan (R.T. 1068), and successfully used the plan on some of his patients. (R.T. 1129, 1132.) He also lectured to young doctors on the value of the plan. (R.T. 1070,

1072-1076.) Dr. Schlosberg testified that in his opinion the plan is as good as plans used by doctors including plans where doctors use drugs. (R.T. 1178.)

It may be that the conflicting expert opinions provided a basis for the jury's finding that a dieter following the diet plan would gain weight instead of losing weight. That is a far cry however from saying that the evidence provides a basis for a jury verdict that petitioners knew that the diet plan would not work and that the statements contained in the advertisement were made with intent to defraud. See, *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94; *In re Winship,* 397 U.S. 358. It should be noted that aside from the expert testimony there is not a shred of evidence to support a finding that petitioners knew that persons following the diet plan would not lose weight.

Moreover as Judge Robinson stated in his concurring opinion in *Rodale Press, Inc. v. Federal Trade Commission,* 407 F.2d 1252, 1258 (D.C. Cir. 1968), the First Amendment may protect unconditionally an advertisement for a book that repeats "false, misleading and deceptive" ideas in the book. See, fn. 2 of Justice Stevens' dissenting opinion in *Splawn v. California,* ..... U.S. ....., #76-143 (June 6, 1977). ("[T]o ban advertising of a book . . . is to suppress the book . . . itself.")

Authoritative interpretations of First Amendment guarantees "have constantly refused to recognize an exception for any test of truth—whether administered by judges, juries or administrative officials. . . . The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs

which are offered.' " *New York Times Co. v. Sullivan,* 376 U.S. 254, 271. A false statement may also have value since it brings about the clearer perception of truth by its collision with error. (376 U.S. at 279, n. 19.)

In medical matters as in other areas of life, the "false and dangerous ideas" of yesterday are now standard practice, and vice versa. The medical experts would have regarded it as homicidal, if the suggestion had been made in the not too distant past that a cardiac patient should take up bicycle riding, or if it had been suggested that a patient should get out of bed the same day he has undergone surgery. Society's present changing attitude towards the drug laetrile illustrates the point that it is arrogant to presume that in any field of knowledge, whether dealing with health or otherwise all answers are now in.

Even if the communications contained in the advertisement for the booklet are not unconditionally protected, they are plainly entitled to *some* First Amendment protection. *Linmark Associates, Inc. v. Township of Willingsboro,* ..... U.S. ....., #76-357 (May 2, 1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748. Advertisements may no longer be placed outside the protection of the First Amendment by merely invoking the talismanic label "fraud." Now allegedly fraudulent advertisements must be scrutinized to see whether they are of a character which the principles of the First Amendment protect. The Court has a duty to carefully review the advertisement and booklet to determine whether the communications contained therein are within the protected area. *New York Times Co. v. Sullivan,* 376

U.S., at 285. Petitioners respectfully submit that their communications do contain information and ideas which bring them within the protected area.

3. The Prosecutor's Highly Prejudicial and Unsubstantiated Argument to the Jury Denied Petitioners Due Process of Law and a Fair Trial Guaranteed by the Fifth Amendment.

As already noted petitioners mailed approximately 28,600 booklets and failed to make refunds in three instances. At the time petitioners moved for a judgment of acquittal, at the close of the government's case, the trial court recognized the thinness of the government's case based on the failure to make refunds. After observing that there were only two government witnesses who requested and did not receive refunds, the court stated: "Of all the other thousands, the government has only been able to show two that did not get their refunds. . . . It seems to me if I were defending . . . that I would argue . . . that out of thousands of solicitations, the government comes up with two or three . . . cases where the people did not get their refunds when the defendant really knew that they wanted the refunds or when this Mrs. Urasaki knew it. Now in those cases why didn't they get their refunds? Well, maybe Mrs. Urasaki sent it through the mail and it just got lost. That is a possibility. The mail gets lost every day. . . . [T]hat is a good argument, and I think it is sustained by the evidence in this case." (R.T. 899, 900-902.) Taking his cue from the trial judge, petitioners' counsel made that precise point to the jury in his closing argument. Thereafter the prosecutor, in rebuttal, argued:

> "Mr. Fisher would have us bring in 10,000 people who did not get refunds. We are not going to bring in 10,000 people, ladies and gentlemen; we are just not going to do it. We brought in some people. They tried to get refunds, and they did not get them." (R.T. 1259.)

This unsubstantiated argument invited the jury to believe that the prosecutor had personal knowledge that 10,000 people requested and did not receive refunds. Petitioners were, in effect, subjected to a trial on the unsworn statements of the prosecutor, which were without evidentiary support in the record.

In *Berger v. United States*, 295 U.S. 78, this Court reversed a criminal conviction because the prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. The Court stated that because it is the obligation of the United States Attorney to see that justice is done, he is not at liberty to strike foul blows although he may, of course strike hard blows. The Court condemned the prosecuting attorney for inviting the jury to conclude that he had personal knowledge, harmful to the accused, which was not in evidence. The Court noted that the average jury has confidence that the United States Attorney will be fair to the defendant. "Consequently improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (295 U.S. at 88.) A large number of circuit courts have reversed convictions because of improper argument by the United States Attorney. *United States v. Bledsoe*, 531 F.2d 888, 892 (8th Cir. 1976);

United States v. Dailey, 524 F.2d 911, 916-917 (8th Cir. 1975); *United States v. Latimer,* 511 F.2d 498, 503 (10th Cir. 1975); *United States v. Phillips,* 527 F.2d 1021, 1023 (7th Cir. 1975); *United States v. Perez,* 493 F.2d 1339, 1343 (10th Cir. 1974); *United States v. Gonzalez,* 488 F.2d 833, 836 (6th Cir. 1973); *United States v. Achtenberg,* 459 F.2d 91, 99 (8th Cir. 1972); *United States v. Stanley,* 455 F.2d 644 (4th Cir. 1972); *United States v. Grunberger,* 431 F.2d 1062, 1068 (2d Cir. 1970); *McMillan v. United States,* 363 F.2d 165, 169 (5th Cir. 1966); *Hull v. United States,* 324 F.2d 817, 826 (5th Cir. 1963); *Dunn v. United States,* 307 F.2d 883 (5th Cir. 1962); *Steele v. United States,* 222 F.2d 628, 631 (5th Cir. 1955).

The prosecutor's improper closing argument was not limited to his statement concerning 10,000 persons who allegedly did not receive refunds. Although the indictment did not charge that petitioners' diet was "dangerous" or that any person's health was endangered, the prosecutor repeatedly spoke of those "who may have had bad health problems." (R.T. 1212.) The prosecutor argued that petitioners' booklet was "dangerous", that losing weight without a doctor's care is dangerous. (R.T. 1212, 1216-1217.) These inflammatory statements went beyond all fair bounds of legitimate argument. The prosecutor knew that his statement that "those diets are harmful" was a misrepresentation of the record.

The prosecutor also improperly vouched for the reliability of the government's witnesses and improperly condemned petitioners' witnesses. After speaking highly

of the government's experts and disparagingly of petitioners' experts the prosecutor argued that petitioners could not get men such as those obtained by the government "because these men told the truth." (R.T. 1216-1217.) In *United States v. White,* 324 F.2d 814, 816-817 (2d Cir. 1963), the court condemned this type of argument by the prosecutor, saying:

> "Although the prosecutor did not use the personal pronoun 'I', nevertheless he was in effect vouching for the reliability of the government's witness and for this purpose personified the 'government' . . . . This negative approach [by the prosecuting attorney concerning the accused's witnesses] he quickly contrasted with the affirmative by saying, in substance, that the government called reliable witnesses who would not testify falsely or change their stories. These comments were quite unwarranted. . . ."

See also, *United States v. Serrano,* 496 F.2d 81 (5th Cir. 1974); *United States v. Ludwig,* 508 F.2d 140, 143 (10th Cir. 1974).

Finally, although the prosecutor knew that petitioners had no obligation to prove anything, he argued that he did not believe that petitioners had proved that the diet plan worked. (R.T. 1215.)

In all the prosecutor was guilty of striking "foul blows" in a pronounced, persistent and prejudicial manner. The cumulative effect upon the jury, "cannot be disregarded as inconsequential." *Berger v. United States,* 295 U.S. at 89.

4. The Judgment Should Be Reversed Because of the Concededly Erroneous Instructions to the Jury Particularly Since the Case Against Petitioners Is Weak and There Were Cumulative Errors Committed.

Although the indictment did not charge conspiracy, the trial judge gave conspiracy instructions. The court below noted that petitioners did not object to these instructions. Accordingly the court stated that it would not reverse "unless there was plain error." Finding no "plain error" the court affirmed. Petitioners submit that the conspiracy instructions were erroneous, and require a reversal, particularly in light of other legal errors herein and the weakness of the evidence against petitioners.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX "A".

Opinion and Judgment of the Court of Appeals, Ninth Circuit.

United States of America, Appellee, v. Outpost Development Company, Appellant. United States of America, Appellee, v. Conrad L. Germain, Appellant. United States of America, Appellee, v. Robert W. Kane, Appellant.

Nos. 75-3160, 75-3060, 75-3161.
United States Court of Appeals, Ninth Circuit.
March 24, 1977.

Defendant individuals and corporation were convicted in the United States District Court for the Central District of California, A. Andrew Hauk, J., of mail fraud, and they appealed. The Court of Appeals, Goodwin, Circuit Judge, held that where multiple specific acts were alleged in each count of indictment, convictions could be sustained where evidence was sufficient with respect to one quoted fraudulent statement in each count, regardless of whether it was also sufficient with respect to each and all of the other acts alleged in the indictment; and that no plain error resulted from "common plan" instructions, though incorrect in two respects.

Affirmed.

Appeal from the United States District Court for the Central District of California.

Before TRASK, GOODWIN and KENNEDY, Circuit Judges.

OPINION

GOODWIN, Circuit Judge:

Conrad L. Germain, Robert W. Kane, and Outpost Development Company, a corporation, were tried before a jury and convicted of eighteen counts of mail fraud (18 U.S.C. § 1341). They appeal.

In 1972, Germain and Kane established Outpost Development Company to conduct a mail order business under the names of Lydia Feldman Methods and Brenda Hardy Research. The defendants operated the business with the help of one employee. They mailed interstate solicitations entitled "Want to Lose Weight?" The solicitations, written under the fictitious name Lydia Feldman, explained how Lydia had discovered in an occult writing a recipe for a diet tonic that converted "unburned calories into energy."

The diet tonic was a mixture of ordinary fruit juices and was to be taken before meals or after meals, depending upon whether the dieter was following the "with meals" plan or the "mealless" plan. Lydia invited the reader to send her $5.95 for the recipe and promised a refund if the customer was not satisfied.

Testimony established that some persons sent the $5.95 but did not receive the diet tonic recipe, and that others requested, but did not receive, a refund. This was, of course, some evidence of fraud.

Multiple specific acts were alleged in each count of the indictment. The defendants argue that if the evidence is insufficient with respect to any one of the fraudulent acts alleged, the guilty verdict on that count should be reversed. They rely principally on *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.

1117 (1931), *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942), and *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). None of these cases supports their position.

In *Stromberg*, the statute contained three alternative clauses, one of which the Court held unconstitutional. Because it was impossible to determine whether the jury had based its verdict of guilty on the unconstitutional clause alone, the Court reversed the conviction.

In *Williams*, the instructions permitted the jury to find the defendant guilty on either of two grounds, one of which was unconstitutional. The Court followed *Stromberg* and reversed.

In *Yates*, the defendant was tried on two different grounds. In submitting the case to the jury the judge misstated the law on one of the grounds. Because the jury could have based its verdict upon an impermissible finding, reversal was necessary.

In all three cases cited above, the convictions were reversed because they could have been based on an erroneous legal ground. Such convictions are defective. These cases, however, are distinguishable from the instant case, in which appellants claim that the jury could have based its finding of fraud on *facts* for which the evidence was insufficient. It is well established that a count in an indictment is not improper if it simply charges the commission of a single offense by different means. *United States v. Markee*, 425 F.2d 1043 (9th Cir.), *cert. denied*, 400 U.S. 847, 91 S.Ct. 93, 27 L.Ed.2d 84 (1970); *United States v. Tanner*, 471 F.2d 128 (7th Cir.), *cert. denied* 409 U.S. 949,

93 S.Ct. 269, 34 L.Ed.2d 220 (1972). *See also* Fed.R. Crim.P. 7(c)(1). Thus, it has been stated:

> "* * * The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged * * *." *Turner v. United States,* 396 U.S. 398, 420, 90 S.Ct. 642, 654, 24 L.Ed.2d 610 (1970); *quoted with approval* in *United States v. Hobson,* 519 F.2d 765, 774 (9th Cir. 1975).

In the case before the court, each count alleged that the defendants falsely and fraudulently represented that by using the diet tonic, "the fats in the foods you eat are changed into energy instead of fat." With respect to this allegation the evidence is more than sufficient to sustain the verdict.

Two government experts testified that a dieter following the "with meals" plan would not lose weight, but would, in fact, gain weight. The testimony of these experts also provided a basis for the jury's verdict.

Because the evidence is sufficient with respect to the quoted fraudulent statement, we need not decide whether the evidence is also sufficient with respect to each and all of the other acts alleged in the indictment.

The defendants next complain about the instructions. The defendants assert that they may have been convicted for conspiracy rather than for the crime charged. The judge instructed the jury that if it found that the defendants had associated themselves in a common plan with the intent to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful

means, then the acts and statements of one defendant in furtherance of the plan would be admissible against the other defendant even though the acts and statements occurred in the absence and without the knowledge of the other defendant.

The defendants did not object to these instructions at trial as required by Fed.R.Crim.P. 30. Because the defendants failed to object, this court will not reverse unless there was plain error under Fed.R.Crim.P. 52 (b). Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

We have examined the instructions here as a whole and in light of the entire record, and we find no plain error. First, the instructions do not permit the jury to base guilt upon mere association in a common plan. The instructions only permit the jury to weigh the acts and statements of one defendant in furtherance of a common plan as evidence against the other defendant. Although such use of evidence is not favored where conspiracy is not charged, *Hernandez v. United States,* 300 F.2d 114 (9th Cir. 1962), it has been permitted in cases like this, involving a scheme to defraud. *United States v. Serlin,* 538 F.2d 737 (7th Cir. 1976); *United States v. Cohen,* 516 F.2d 1358 (8th Cir. 1975); *United States v. Grow,* 394 F.2d 182, 203 (4th Cir. 1968); *Robinson v. United States,* 33 F.2d 238, 240 (9th Cir. 1929).

Second, the only essential elements of mail fraud under 18 U.S.C. § 1341 are that the defendant devised a scheme to defraud and that for the purpose of executing this scheme he used the mails or caused the mails to be used. 18 U.S.C. § 1341. A person

may cause the mails to be used even though he did not know that the mails were to be used or intend that the mails be used, provided that the use of the mails was reasonably foreseeable. *United States v. Weisman*, 83 F.2d 470, 473 (2d Cir. 1936) (A. Hand, J.).

In the "common plan" instructions, the trial judge told the jurors that if they first found a common plan to commit an unlawful act, then they could hold one defendant responsible for the acts of another defendant. These instructions are incorrect in two respects: first, a common plan to commit an unlawful act is not necessarily a scheme to defraud; second, the "common plan" instructions did not make it clear that the acts must be foreseeable.

Neither of these variations constitutes plain error. Besides the "common plan" instructions, the judge also defined "a scheme to defraud" for the jury. He explained that a scheme to defraud "include[s] any plan or course of action intended to deceive others, and to obtain, by false pretenses, representations, or promises, money or property from persons so deceived." Furthermore, the only evidence of a common plan introduced at the trial was evidence of the fraudulent scheme. Because the only evidence of a common plan was evidence of the fraudulent scheme, the instruction, even if not wholly correct as a matter of law, could not have prejudiced the defendants.

Although the judge did not tell the jury in the "common plan" instructions that the acts had to be foreseeable, the judge later went to some length to explain that a defendant need not do the actual mailing or specifically intend that the mails be used so long as the use of the mails was reasonably foreseeable.

Evidence at the trial established that the defendants had jointly rented post office boxes for the purpose of receiving mail addressed to Lydia Feldman Methods and Brenda Hardy Research and that both defendants picked up the mail delivered to these post office boxes.

Again, the only essential elements of mail fraud are that a person devised a scheme to defraud and that, for the purpose of executing this scheme, the person used the mails or caused the mails to be used. The jury knew they must find that the defendants devised a scheme to defraud and that they intended to cause the mails to be used to carry out the scheme, or that the use of the mails in the scheme was foreseeable. As to the essential elements of mail fraud, the instructions were clear. There was no plain error.

Affirmed.

APPENDIX "B".

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc.

Received May 27, 1977.

Filed: May 16, 1977.

United States Court of Appeals for the Ninth Circuit.

United States of America, Appellee, v. Outpost Development Company, Appellant. No. 75-3160.

United States of America, Appellee, v. Conrad L. Germain, Appellant. No. 75-3060.

United States of America, Appellee, v. Robert W. Kane, Appellant. No. 75-3161.

ORDER

Appeals from the United States District Court for the Central District of California.

Before: TRASK, GOODWIN, and KENNEDY, Circuit Judges.

The panel in the above-entitled cases has voted unanimously to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "C".

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment are: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fifth Amendment are: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

3. The pertinent provisions of the Sixth Amendment are: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ."

4. Title 18 U.S.C. §1341 (*Frauds and Swindles*) provides that:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or

at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

APPENDIX "D".

Count One of the Indictment.

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §1341]

From on or about June 19, 1972, and continuing to on or about April 1, 1974, defendants OUTPOST DEVELOPMENT COMPANY, doing business as Lydia Feldman Methods and Brenda Hardy Research, CONRAD L. GERMAIN, and ROBERT W. KANE, devised and intended to devise a scheme and artifice to defraud and for obtaining money from numerous persons throughout the United States, by means of false and fraudulent pretenses, representations and promises about "My Secret", a diet plan purportedly devised by Lydia Feldman and Brenda Hardy, well knowing said pretenses, representations and promises were false and fraudulent when made.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, that between June 19, 1972 and November 19, 1973, OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods, CONRAD L. GERMAIN and ROBERT W. KANE, would and did cause "My Secret" direct mail solicitations to be mailed to numerous persons throughout the United States, with a return address of L. Feldman, 8228 Sunset Boulevard, Hollywood, California 90046.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises that between November 1, 1973 and April 1, 1974, OUTPOST

DEVELOPMENT COMPANY, dba Brenda Hardy Research, CONRAD L. GERMAIN and ROBERT W. KANE, would and did cause "My Secret" direct mail solicitations to be mailed to numerous persons throughout the United States, with a return address of Brenda Hardy Research, 11848 Vose Street, North Hollywood, California 91605.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods and Brenda Hardy Research, CONRAD L. GERMAIN and ROBERT W. KANE, would and did make the following false and fraudulent representations in the "My Secret" direct mail solicitations:

a. That Lydia Feldman is a real person.

b. That Brenda Hardy is a real person.

c. That Lydia Feldman, quite by accident, in some occult book, came across a tonic to be taken before each meal to preserve the body.

d. That Brenda Hardy, quite by accident, in some occult book, came across a tonic to be taken before each meal to preserve the body.

e. That Lydia Feldman, being curious, tried the tonic.

f. That Brenda Hardy, being curious, tried the tonic.

g. That Lydia Feldman lost 12 pounds within a week of first trying the tonic.

h. That Brenda Hardy lost 12 pounds within a week of first trying the tonic.

i. That Lydia Feldman's friends tried the tonic and reported similar results.

j. That Brenda Hardy's friends tried the tonic and reported similar results.

k. That the fats in the foods you eat are changed into energy instead of fat.

l. That pounds and inches will vanish from sight.

m. That the simple directions for making and using "My Secret" can be in your mail box in just a few days.

n. That results are guaranteed.

o. That a person who buys "My Secret" must lose weight faster, safer and easier than he ever imagined possible, or he will get his money back.

It was a part of said scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises, that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods and Brenda Hardy Research, CONRAD L. GERMAIN and ROBERT W. KANE, would and did accept money and orders for "My Secret", which orders in many instances they did not fill.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods and Brenda Hardy Research, CONRAD L. GERMAIN and ROBERT W. KANE, would and did use the addresses of 8228 Sunset Boulevard, Los Angeles, California 90046 and 11848 Vose Street, North Hollywood, California 91605, to receive money and orders for "My Secret" diet plan.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudu-

lent pretenses, representations and promises that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods and Brenda Hardy Research, CONRAD L. GERMAIN and ROBERT W. KANE, would and did use a checking account at the Crocker National Bank, 6424 Sunset Boulevard, Hollywood, California, to deposit money from those persons intended to be defrauded.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods, CONRAD L. GERMAIN and ROBERT W. KANE, would and did use P. O. Box 46100, Los Angeles, California, in which to receive money and orders for "My Secret" diet plan.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods and Brenda Hardy Research would and did in many instances furnish "My Secret" diet plan to persons who ordered and paid for it, said defendants well knowing that "My Secret" had no medical basis for losing weight.

It was a part of said scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, that OUTPOST DEVELOPMENT COMPANY, dba Lydia Feldman Methods and Brenda Hardy Research, CONRAD L. GERMAIN and ROBERT W. KANE, would and did in many instances fail to make refunds to those persons who specifically requested them.

On or about June 22, 1972, in Los Angeles County, within the Central District of California, defendants OUTPOST DEVELOPMENT COMPANY, CONRAD L. GERMAIN and ROBERT W. KANE, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, caused to be sent or delivered by the United States Postal Service a letter containing check number 456 for $5.95, dated June 19, 1972, addressed to Lydia Feldman, 8228 Sunset Boulevard, Los Angeles, California 90046, having been placed in the mail by Natalie Monat, at Arlington, Virginia.

APPENDIX "E".

The Advertisement.
Want to Lose Weight?

If you're like me, you've probably tried diets and pills and gadgets and exercises and health spas and who knows what else—without lasting success. The moment you stop dieting or exercising, those horrible pounds come rushing back.

And isn't it the most maddening thing the way some people can eat anything and everything and never put on weight?

Now there has to be a reason why we can't keep the weight off and why others never gain weight—and here it is: No matter what you have been told in the past, the only reason an adult gains weight is because his body is not able to convert all of the calories he eats into energy. Those unconverted calories collect on the body in the form of useless fat.

But the person whose body is able to convert *all* the calories into energy stays 'slim as a rail'—no matter how much he eats.

Simple, isn't it. But what can you do about it? How can you get your body to start burning up those calories instead of storing them?

Quite by accident, in some occult writings that I was studying, I came across a tonic to be taken before each meal to 'preserve the body'. Being curious, I tried it—and was shocked. Within the first week, I had lost 12 pounds without experiencing a moment of food-craving hunger. My astonished friends tried it and reported similar results.

Don't ask me how it works—but it does! Taken before each meal, this tonic seems to have a magic effect on the body. You feel an instant lift as your body goes to work doing whatever it does to convert all those unburned calories into energy. And best of all, the ingredients for this tonic are *not* expensive and are available in any health food store.

Think of it! No more tortuous diets. No more strain on your nerves. No more inhuman demand on your willpower to starve yourself while others around you feast.

Just think what this means to you! Now the starches, the carbohydrates, the fats in the foods you eat are changed into *energy*—instead of fat. Meal time, snack time, party time are no longer moments of regret—no longer the cause of more fat—because now *your body is protected!*

Never again do you have to punish yourself with harsh and tiring exercises or follow diets that turn you into a ragged bundle of nerves. There's no strain on you—no drain on your health—no expensive change in your living (except, of course, for the *new clothes* you will have to buy as the pounds drop off and stay off).

So if you are seriously determined to lose weight—and *keep it off*—if you've finally made up your mind that never again will you suffer the shame and embarrassment of being overweight—if you want to see pounds and inches vanish from sight—and *vanish forever*—take advantage of this offer today.

The simple directions for making and using this amazing tonic—which I call "*MY SECRET*"—can be

in your mailbox in just a few days. Results are guaranteed. You be the judge. You must lose weight—and lose it faster, safer, and easier than you ever imagined possible—or your money back. Use the handy no-risk coupon below.

LYDIA FELDMAN
RESEARCH DIRECTOR
8228 Sunset Blvd—Los Angeles, CA 90046

YES, I want to lose weight and keep it off. Send to me the directions for making and using "*MY SECRET*"—the safest, fastest, most effective fat-destroyer in the world. I understand that the inexpensive ingredients for this tonic are available in any health food store.

I must start losing weight within the first 24 hours—and continue to lose it and keep it off as long as I continue to use "*MY SECRET*" or my money will be refunded in full.

Enclosed is full payment of $5.95

☐ cash ☐ check ☐ money order

☐ Mr. ☐ Mrs. ☐ Miss

Print Name .....

Address .....

( ).....State .....Zip Code .....

Please note: You must not only lose pounds but *inches* as well. And you must look and feel better than you ever have in your entire life—without feeling a moment of hunger—or YOUR MONEY BACK.

Lydia Feldman Methods
8228 Sunset Blvd.—Los Angeles, CA 90046
F-523

APPENDIX "F".

The Booklet
M Y
S E C R E T
by Lydia Feldman

The
Lydia Feldman
Method
for
Weight Control

Published by Lydia Feldman Methods, 8228 Sunset Boulevard, Los Angeles, California.

First Printing: February 1972

THANK YOU for ordering this booklet describing 'my secret' for losing weight and keeping it off.

In the weeks ahead—as you follow this program—all of your friends and relatives who watch your progress will marvel at your new trim figure as it appears.

How proud and pleased you'll be!

And to retain that new slimness for years to come, all you need to is to continue to follow the simple rules in this booklet.

Best wishes,

Lydia Feldman

CONTENTS

IMPORTANT

Whether this is your first time—or another attempt at losing weight, you must start this program with the idea firmly planted in your mind that you'll stay with it until you have reached your goal. And make sure the goal you set is a realistic one.

If you don't sincerely want to lose weight—if you're not prepared to follow my program conscientiously—then go no further in this booklet. Instead, return it for an immediate refund.

A WORD ABOUT YOUR HEALTH

Your health is your most precious asset and should not be taken for granted. Care should be taken with any program of weight loss. Remember that you should lose weight for the sake of your health and not for your appearance alone. If you are in doubt, consult your doctor.

As with any major change in your daily way of life, don't abuse your body. The program outlined in this

booklet will provide a most adequate reduction in your weight. Don't deprive yourself of *all* food just for a quicker weight loss.

Also, bear in mind that losing weight is a personal matter. Each person is his own special case. Don't judge your progress by others. Body metabolism is different with each individual. My program is designed to be successful—*if you follow it!*

MY SECRET

Here's how you can drink your way to a slim figure —and keep it.

Mix one-half cup of grape juice, one-half cup of apple juice, and one large mashed banana. Blend together and drink just before your regular meals.

Eat *nothing* between meals. If you must have something to carry you to the next meal, mix up another batch of this tonic. You can drink all you want of this tonic. Unlike regular foods, you cannot 'over-consume' this tonic.

That's all there is to it.

Sound too simple to be true?

HERE'S THE CATCH

You cannot use the ordinary canned, frozen, or bottled versions of the juice that are available in the ordinary supermarket. *They will not work!*

I cannot emphasize this too strongly. The ordinary juices that you buy in the supermarket are saturated with additives, preservatives, white sugars, and sweeteners. The white sugars in particular upset your body metabolism, your body chemistry, and the delicate calcium phosphorous balance of your body.

Furthermore, most commercially-prepared supermarket juices have undergone a pre-heating process to pasteurize and preserve them for a long life on your grocer's shelves. This is great for your grocer but the pre-heating destroys many valuable and perishable nutrients and enzymes your body must have to make this program work.

You must purchase fresh fruits and squeeze your own juice. If this is impossible, go to a health food store and have them squeeze juice for you. As a last resort, certain bottled juices can be used—but will not work nearly as well as freshly-squeezed juice. The label on these bottled juices must read: *'No Sugar Added and No Preservatives.'*

HOW TO SQUEEZE JUICE

An electric juice extractor, such as those sold in almost all health food stores and houseware outlets is the best. An electric model is able to separate the juice from the pulp in a matter of minutes. The juice comes down a funnel right into your glass. Visit any health food store and make your selection.

Second choice would be a manual juicer. You will have to press a lever to get the juice. Nevertheless, it does the job and will save you some money.

If you are without a juicer (traveling, for example), make your own juice in this simple manner. Cut the fruit into small pieces. Wrap in some clean cheesecloth.

Twist and squeeze the juice into a glass. Mash the banana with a fork and add it to the juice.

Always select fresh fruit. Select organically grown fruits if possible, such as those sold in health food stores.

Store in a refrigerator (except the bananas) to prevent loss of vitamin and mineral supply.

Cut out all discolored spots. These should not be used since they may cause 'juice fermentation' and loss of nutrients.

Wash the apples and grapes beneath free-flowing faucet water. Use a stiff vegetable brush to scrub away any residue.

Slice the apples into small pieces that can be inserted easily into the feeder of the juicer. Close the lid or whatever is used. Press the switch. The juice will come down the funnel right into your glass. Do the same with the grapes. Add the banana. Blend and drink on the spot.

Never store freshly-squeezed juice. But if you must, use a glass bottle. Screw on a tight cap. Store in the section of the refrigerator where you keep the milk.

Keep your juicer sparkling clean. Use warm water and a brush immediately after you have finished squeezing the juice. You will be rewarded with many years of excellent service. At the time you acquire your juicer, ask for instructions on how to operate and maintain it.

WATCH THE TEMPERATURE

To be properly effective, the tonic you drink must be neither too cold or too hot. If you store your juice in bottles in the refrigerator, remember to bring it out of the refrigerator ahead of time.

Ice cold juices decrease or halt the flow of digestive enzymes and cause the famous 'summer diarrhea'. Very warm juices create a sudden flow of digestive enzymes which lead to stomach upset.

If you are preparing fresh juice, squeeze the juice immediately after you remove the fruit from the refrigerator. This will give you the best possible juice at exactly the right temperature for your body.

WHY THIS TONIC WORKS

Many of the precious 'body building materials' and vitamins are found in the juices of fresh fruit. These are locked within the cellulose fibers of the plant. In order to take out these nutrients, the digestive system must labor to break down the fibrous cells. For many persons this poses a difficult problem for their digestive system. But raw juices contain 'instant digestion' of such nutrients that might otherwise remain locked within the cellulose fibers and imprisoned until passed off as body waste.

The body can assimilate over 90% of the nutrients in fresh juices within 10 to 20 minutes. It can take up to four hours to assimilate bulk food. It is this power of the juices that make this tonic work. What you eat is vital but what you assimilate is inviolate. Fresh juice provides the speedy assimilation *without bulk* that your body needs to remain healthy and slim.

No less an authority than the British Ministry of Health and Public Health Service Laboratory says this about freshly-squeezed juice: *"The sources of the essential amino acids, the cell building factors, are destroyed by heat and processing and are not obtainable in foods thus prepared. Juices, therefore, are the only means practical to get these re-building factors.*

Most persons are overweight because they eat too much. The key to appetite control is to stabilize your blood sugar level. The natural sugars in the grapes and apples combine with the fruit sugar of the bananas in this tonic.

When this tonic is absorbed into your body's system (which is almost immediately) the blood sugar concentration rises and is maintained for a period of time along with a slowly-released carbohydrate action which controls your appetite and reduces the urge to eat.

NEED I SAY MORE

Get busy right now. Search out and obtain a supply of the ingredients for this tonic and start using it today.

But remember—you won't get anywhere by taking the easy route of buying ordinary canned or frozen juice from your supermarket. It won't work.

You've got to do the work of squeezing it yourself or finding a place that will squeeze it fresh for you. But if you can gain—and keep—a slim, trim figure, won't it be worth it?

REMEMBER

Buy fresh fruit.

Squeeze it yourself.

Make only as much as you need for one use. You'll soon learn how much fruit to use.

SPECIAL TIPS

1 — Never skip a meal.

2 — Drink one glass of this tonic just before your regular meals.

3 — Eat *nothing* between meals except this tonic. You can drink all you want of this tonic as your body will not permit you to 'over-consume' it.

4 — Chew your food thoroughly. Take small bites. Eat slowly. Make the most of each meal.

5 — Don't weigh yourself every day. Weigh yourself just once a week—at the same time—on the same scale.

6 — If you fall off this program, don't hate yourself. Start again—right away.

7 — Don't get discouraged. Those extra pounds won't vanish overnight. Remember you did not gain your excess weight in just a few days—so it is not fair to expect to lose it in a few days.

8 — Most persons will lose a large amount of weight the first week, less the second week, and probably none the third week. Don't let that discourage you. Don't be a quitter the third week. Your weight loss will start in again during the fourth week.

9 — If you're a woman, remember that you'll probably gain a few pounds of water the week before your menstrual period, but you will lose this extra poundage in a few days. Don't let that make you a quitter.

STICK WITH IT.

YOU'LL BE GLAD YOU DID.

FOOTNOTE

I had thought this method for weight control to be my own, having found it in an old occult book where it was described as a tonic to 'preserve the body'.

Imagine my surprise to discover this same tonic while reading a book by Carlson Wade, editor of Popular Medicine magazine. His book, entitled *"Health Tonics, Elixirs, and Potions for the Look and Feel of Youth"*, was published in 1971 by Parker Publishing Company. On pages 189 and 190 you will find he speaks most highly of this method for weight control.

I am deeply indebted to Mr. Wade for his explanation of how this tonic works and I highly recommend his book to those of you who would like more information on what nature's 'pure foods' can do for you.

No. 77-57

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONRAD L. GERMAIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 552 F. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1977. A petition for rehearing was denied on May 16, 1977 (Pet. App. B). Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to July 14, 1977, and the petition was filed on July 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence presented at trial was sufficient to sustain petitioners' convictions for mail fraud.

2. Whether petitioners' fraudulent advertisement of their diet booklet was protected by the First Amendment.

3. Whether certain remarks in the prosecutor's closing argument deprived petitioners of a fair trial.

4. Whether certain instructions to the jury constituted plain error.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on 18 counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioners Germain and Kane were each sentenced to consecutive terms of five years' imprisonment on each count and fined $18,000, pending the results of a study by the Attorney General as provided in 18 U.S.C. 4208(c).[1] The corporate petitioner was fined $18,000. The court of appeals affirmed (Pet. App. A).

The evidence showed that in 1972 petitioners Germain and Kane established the Outpost Development Company in order to conduct a mail order business under the names of Lydia Feldman Methods and Brenda Hardy Research. Petitioners thereafter mailed interstate solicitations entitled "Want to Lose Weight?" (Pet. App. E). The solicitations, written under the fictitious name "Lydia Feldman," explained that in the course of her studies of

[1]Since their convictions, petitioners have been free on personal bond. As a consequence, the study ordered by the district court has not yet been conducted.

"some occult writings" Lydia had accidently discovered a tonic which, if taken regularly, would convert the "unburned" portion of a person's caloric intake into energy. Readers were invited to send Lydia $5.95 for the tonic's recipe and were promised a full refund if not satisfied.[2] Numerous customers who remitted the requested amount received by return mail a copy of the booklet "MY SECRET: The Lydia Feldman Method for Weight Control." Persons wishing to participate in the weight loss program described in the booklet were instructed to consume three times daily a mixture of half a cup of grape juice, half a cup of apple juice, and a large mashed banana. Some versions of the booklet recommended that the "tonic" be taken before meals (Tr. 304-308; Pet. App. F); other versions urged that the tonic be used as a substitute for meals (Tr. 280-316).

At trial, the government produced expert witnesses who testified that taking the diet tonic with meals would not result in weight loss but in fact would cause significant weight gain (Tr. 308-309, 1149), and that, while taking the diet tonic instead of meals might cause weight loss, it would also produce a severe protein and mineral deficiency, ultimately resulting in liver damage, anemia, and chronic malnutrition (Tr. 313, 1148-1149). Lay witnesses testified for the prosecution either that they had sent petitioners checks for $5.95 but had never received copies of the diet plan (Tr. 387-389, 407-408, 525) or that they had requested a refund after being dissatisfied with the plan but had never received one (Tr. 531-532, 544).

[2]Petitioners also mailed similar solicitations written under the fictitious name "Brenda Hardy" (Tr. 397-404). In response to their solicitations, petitioners received, over an extended period of time, more than one thousand pieces of mail daily from the consuming public (Tr. 588-589, 608-609, 623).

ARGUMENT

1. Each count of the indictment alleged that petitioners had devised a scheme to defraud persons throughout the United States and to obtain money from those persons by means of false and fraudulent pretenses, representations, and promises. The indictment further alleged that, as part of that scheme, petitioners had mailed solicitations containing numerous false and fraudulent representations, including, for example, that Lydia Feldman was a real person, that her secret recipe would change food into energy rather than fat, and that positive results were guaranteed or the purchase price of the Feldman booklet would be refunded. In its instructions on the elements of the mail fraud offense, the district court charged the jury as follows (Tr. 1294):

> It is not essential that the Government prove each and every false pretense, representation or promise alleged to have been made, but it is essential that the proof show beyond a reasonable doubt that a particular defendant made, or caused to be made, any one of the alleged false and fraudulent promises, representations and pretenses, as alleged.
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> * * * * *
>
> Further, any such statements, in order to find any defendant whom you are considering guilty of any offense that you are considering, as set forth in any of the counts, must be found beyond a reasonable doubt to be a substantial statement and substantially false at the time any such defendant mailed or caused to be mailed any matter.

Petitioners contend (Pet. 8-11) that their convictions must be reversed because the district court authorized the jury to return a guilty verdict if it was convinced beyond a

reasonable doubt that petitioners had made "any one" of the alleged false promises and representations, whereas, they claim, the evidence presented by the government was insufficient to establish the fraudulent nature of several of the representations listed in the indictment. The general form of the jury's verdict, in petitioners' view, makes it impossible to determine whether the jury's actual finding of fraud was supported by adequate evidence. Relying on a line of cases beginning with *Stromberg* v. *California*, 283 U.S. 359, petitioners assert that their convictions cannot stand.

Petitioners' argument is based on a misconception of the mail fraud offense. A crime is committed under 18 U.S.C. 1341 when an individual devises a scheme to defraud, and then uses the mails or causes the mails to be used for the purpose of executing that scheme. Completion of the offense does not depend upon the making of a false or fraudulent representation. As the Tenth Circuit has explained in a case involving the statutory predecessor to Section 1341:

> It is not the making of the false pretenses, representations, or promises that constitutes the first element of the offense. It is the devising or intending to devise the scheme. It is neither necessary to allege nor prove that the false pretenses, representations, or promises were actually made. But proof that the false pretenses, representations, or promises were made is usually adduced to establish the scheme charged in the indictment.

Graham v. *United States*, 120 F. 2d 543, 544 (C.A. 10) (footnote omitted). Thus, even assuming that none of the specific representations alleged in the indictment was in itself fraudulent, the jury would not have been precluded from finding that petitioners had devised a scheme to

defraud and had used the mails to implement that scheme. See also *United States* v. *Reicin*, 497 F. 2d 563, 569 (C.A. 7), certiorari denied, 419 U.S. 996; but see *Schaefer* v. *United States*, 265 F. 2d 750, 753 (C.A. 8), certiorari denied, 361 U.S. 844. Thus, to the extent that the district court's instructions to the jury required for conviction a finding that petitioners had made a "substantially false" statement in the Lydia Feldman solicitations, those instructions were significantly more favorable than petitioners had a right to demand.

Secondly, even if the making of an identifiable fraudulent representation were a necessary aspect of a mail fraud violation, petitioners' convictions would not be rendered invalid by a failure to prove the fraudulent nature of each statement alleged in the indictment. It is well settled that not every allegation of an indictment charging a scheme to defraud need be proved in order to sustain a conviction. See, *e.g.*, *United States* v. *Zeidman*, 540 F. 2d 314, 317-318 (C.A. 7), certiorari denied, 429 U.S. 918; *United States* v. *Joyce*, 499 F. 2d 9, 22 (C.A. 7), certiorari denied, 419 U.S. 1031. Instructions similar to those given in this case by the district court have been repeatedly approved. See, *e.g.*, *United States* v. *Serlin*, 538 F. 2d 737, 748 (C.A. 7); *United States* v. *Joyce*, *supra*; *Schaefer* v. *United States*, *supra*; La Buy, *Manual on Jury Instructions in Federal Criminal Cases*, Part II, § 16.02, 36 F.R.D. 457, 601. As the court of appeals correctly found, the prosecution in this case presented evidence clearly sufficient to support a jury finding that petitioners had fraudulently represented the Feldman tonic's capacity to convert caloric intake into energy rather than fat. Taken as a whole, the evidence at trial demonstrated beyond a reasonable doubt both the existence of a fraudulent scheme and the use of the mails to further that scheme.

Petitioners' reliance on *Stromberg* v. *California*, *supra*, *Williams* v. *North Carolina*, 317 U.S. 287, and *Yates* v. *United States*, 354 U.S. 298, is misplaced. As the court of appeals noted (Pet. App. A 3):

> [T]he convictions [in those cases] were reversed because they could have been based on an erroneous legal ground. Such convictions are defective. * * * [They are, however,] distinguishable from the instant case, in which appellants claim that the jury could have based its finding of fraud on *facts* for which the evidence was insufficient.

In the latter situation, the general rule is as stated by this Court in *Turner* v. *United States*, 396 U.S. 398, 420: "[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged."[3]

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[3]*Cramer* v. *United States*, 325 U.S. 1, is not to the contrary. That case involved a prosecution for treason. The relevant statutory section (18 U.S.C. (1940 ed.) 1) provided only that

> [w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Article III, Section 3 of the Constitution, however, provides that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Interpreting this constitutional requirement, the Court in *Cramer* stated (325 U.S. at 34; footnotes omitted):

> The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. * * *

Finding that two of the three overt acts submitted to the jury did not meet this standard, the Court reversed petitioner's treason conviction.

2. Petitioners maintain (Pet. 12-16) that the communications contained in their direct mail solicitations are protected by the First Amendment. This argument is without merit. The First Amendment does not protect false or fraudulent commercial advertising. *Lynch* v. *Blount*, 330 F. Supp. 689, 694 (S.D. N.Y.), affirmed, 404 U.S. 1007. Indeed, in a recent decision describing the First Amendment's protection of commercial speech, this Court took pains to emphasize that the Constitution "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772.

3. Petitioners next assert that they were deprived of a fair trial through the cumulative effect of certain remarks made by the prosecutor during his closing argument. At trial, petitioners raised only one objection to the prosecutor's comments. In his closing argument, defense counsel stated (Tr. 1244):

> [The government has] shown that three or four people did not get refunds. That is the whole evidence in this case. You are not to imagine, conjecture, speculate as to what else [the government] might have proven, because that is all [the government] chose to prove. That is all, perhaps, [it] could prove.

In rebuttal, the prosecutor told the jury (Tr. 1258-1259):

> You are allowed to draw any natural or ordinary inferences you might draw from the evidence. You

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The affinity between *Stromberg* and *Cramer* is obvious. In both cases, the jury's guilty verdict might have rested on unconstitutional grounds; in neither case was this Court asked to review a claim that the jury may have found facts supported by insufficient evidence.

> are allowed, you are supposed, to use your common sense and draw whatever reasonable inferences you may from the evidence. [Defense counsel] would have us bring in 10,000 people who did not get refunds. We are not going to bring in 10,000 people, ladies and gentlemen; we are just not going to do it. We brought in some people. They tried to get refunds, and they did not get them.

The district judge overruled petitioners' objection to this statement and, at the same time, repeated his earlier admonition to the jury that counsel's remarks were argument, not testimony or evidence (Tr. 1259).

A more liberal standard is employed in evaluating rebuttal, as opposed to initial, argument. See, *e.g.*, *United States* v. *Lawler*, 413 F. 2d 622, 628 (C.A. 7), certiorari denied, 396 U.S. 1046; *Gray* v. *United States*, 394 F. 2d 96, 101 (C.A. 9), certiorari denied, 393 U.S. 985. The prosecutor's comments were a legitimate response to the earlier argument of defense counsel. In any event, when considered in the light of all the evidence, the prosecutor's remarks did not deprive petitioners of a fair trial.[4] See *United States* v. *Bowen*, 500 F. 2d 41 (C.A. 6), certiorari denied, 419 U.S. 1003.

4. Petitioners contend finally (Pet. 20) that their convictions should be reversed because the district court gave conspiracy instructions to the jury although no conspiracy offense was charged in the indictment. Petitioners raised no objection to the court's instructions at the time they were given. Even now, petitioners have

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[4]Viewed separately or together, the other portions of the prosecutor's argument with which petitioners now find fault do not constitute plain error and hence do not justify reversal in the absence of objection at trial.

not explained how they were prejudiced by the district court's alleged failings. The court of appeals correctly concluded (Pet. App. A 5-7) that the instructions given were accurate and clear as to the essential elements of mail fraud, and that any flaws in those instructions did not constitute plain error under Rule 52(b), Fed. R. Crim. P. See *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977, slip op. 8 ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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